

national, regional and local markets, it is widely believed that such a reduction in inventory would be likely, in the long run, to deprive viewers of the baseball telecasts they demand most (i.e., those shown by authorized national and local carriers) unless restrictions are placed on superstations.

National Football League. The NFL is generally regarded, and has proven to be, the strongest of the sports league television products, due in large part to its familiar, predictable schedule and limited number of games. Nevertheless, the NFL's television partners are losing money and its ratings have declined over the last decade because, in part, of its decision to sell packages to five different national networks and to increase the number of advertising units included in each game telecast. The NFL also has been adversely affected by the glut of sports and other offerings on television and by cuts in advertising budgets. However, while the NFL's television product could be strengthened and made more appealing to advertisers by reducing its per-game commercial inventory and the number of outlets carrying its games, the NFL is expected to continue to dominate the sports television marketplace.

National Hockey League. Apart from NBC's carriage of the NHL All-Star Game, there has been no recent national broadcast network interest in the NHL. Moreover, the NHL's recent one-year agreements with SportsChannel America for the 1991-92 season and with ESPN for the 1992-93 season -- under which the NHL reportedly contracted for less in rights fees for two seasons than it received for the 1990-91 alone -- evidence a decline in the value of the NHL as a national cable product. Accordingly, while the NHL continues to seek national television exposure, its current television policy places emphasis on local cable packages and developing other forms of distribution, including pay-per-view.

NCAA Football and Basketball. The college football and basketball television products, with the possible exception of CBS' exclusive coverage of the NCAA College Basketball Tournament, have become fractionalized over the last decade. As a result, ratings and advertising interest have declined for all regular season college football and basketball packages as well as for each of the major bowl games. The future prospects for college football are not promising since the product is splintered and no Association, Conference, or school has control of the entire inventory and can thus provide its telecast partner with meaningful exclusivity. College basketball's telecasters, however, have begun to protect regular season packages and eliminate (or limit) risks by selling time allocated for regular season games to independent programming groups, such as Raycom, and by reducing the number of games telecast.

Olympics. Although the Olympics are regarded as a special, unique television event -- and usually an attractive buy for advertisers -- the Olympics are not immune from the effects of the glut of televised sports, the multitude of viewer and advertisers alternatives and the fierce competition among sports products for shares of fixed advertising budgets. In fact, both CBS and NBC, rights holders to the 1992 Winter and Summer Olympic Games, respectively, had trouble selling their advertising inventory and reportedly lost money. In addition, the telecasters of the 1992 Olympic Games, by offering "thousands of hours" of coverage, have further saturated the sports television marketplace.

National Basketball Association. The NBA is as vulnerable as any sports television product to oversaturation, fragmentation and competition from uncontrolled inventory of its programming. However, through policies aimed at regulating the distribution of NBA games, the NBA has been able to maintain and enhance

the value of its product by controlling and balancing its national, regional and local distribution patterns. The NBA has also worked closely with its television partners to insure that they are successful by helping them forge relationships with NBA sponsors and by providing them with various degrees of exclusivity. The NBA has been fortunate, too. It has been the beneficiary of the influx of popular players like Michael Jordan and of baseball's recent sluggishness in the second quarter.

The future prospects for the NBA's television product depend on its continued ability to provide telecasters with exclusivity, to guard against uncontrolled superstation inventory competing with its own telecasters, and to adapt to changes in the sports television marketplace. If the NBA is unable to control its television product in the national market, it could, like baseball, face long-term reductions in rights fees and in the number of its games televised.



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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of)	
)	
Implementation of the)	
Cable Television Consumer)	MM DOCKET NO. 92-259
Protection and Competition)	
Act of 1992)	
)	
Broadcast Signal Carriage Issues)	

COMMENTS OF
NATIONAL BASKETBALL ASSOCIATION
AND
NATIONAL HOCKEY LEAGUE

COME NOW the National Basketball Association (hereinafter sometimes "NBA") and the National Hockey League (hereinafter sometimes "NHL") (collectively sometimes "the Leagues") and file these comments in response to the Commission's Notice of Proposed Rule Making, Mass Media Docket No. 92-259, dealing with broadcast signal carriage issues affected by the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter "the Act").¹

The National Basketball Association is composed of twenty-seven teams throughout the continental United States. With respect to the broadcast of NBA games, all but one NBA

¹Pub. Law 102-385, 102 Stat. ____ (1992).

team have over-the-air television contracts.² Five of the teams -- Atlanta (WTBS), Chicago (WGN-TV), Dallas (KTVT), Denver (KWGN-TV), and New Jersey (WWOR-TV) -- have contracted for the broadcast of some of their games on superstations.³ In addition, the NBA has a national broadcast contract with the NBC network calling for the broadcast of twenty-five games during the current 1992-93 regular season and approximately twenty-five more during the playoffs.

The National Hockey League has sixteen teams in the continental United States and eight in Canada, most of which have over-the-air television contracts and two of which -- Boston (WSBK-TV) and Los Angeles (KTLA-TV) -- are on superstations. In addition, the National Hockey League has announced a further expansion, adding teams in the 1993-94 seasons in Anaheim and Miami.⁴

As programmers in the television marketplace, the Leagues have a substantial interest in certain issues raised in this proceeding, including the appropriate definition of

²The New York Knicks do not have an over-the-air contract. Three teams -- Atlanta, Golden State, and Minnesota -- are each televised by two broadcast stations.

³A superstation is defined, per Section 325(b)(2), under the definition in 17 U.S.C. §119(d) as:

. . . [A] television broadcast station, other than a network station
. . . that is secondarily transmitted by a satellite carrier.

⁴Wall Street Journal, December 11, 1992, at B1.

a "local" television market, the applicability of 47 C.F.R. §76.67 in the must-carry scheme, the limited scope of the exceptions to retransmission consent, and the need of a broadcast station to obtain permission from the copyright holders of its programming before it grants retransmission consent.

COMMENTS

A. Must-Carry

1. Definition of a Local Commercial Station (Paragraph 17 of the Rule Making).

The Leagues support the Commission's proposal to incorporate the Cable Act's definition of a local commercial station into its rules.

Under Section 614(h)(1) of the Act, any broadcast station located in the same "television market" as a cable system is considered "local" to that system.⁵ However, if a station is considered "local" pursuant to Section 614(h)(1), but is also a distant signal under Section 111 of

⁵The determining factor for "local" status, as the House Report notes, is the Arbitron ADI Market Index:

The Committee recognizes that ADI lines establish the markets in which television [stations] buy programming and sell advertising . . . The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-base definition.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 97 (1992) (hereinafter "House Report").

the Copyright Act, that station may be included in the must-carry scheme only if such station agrees

to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system.

Section 614(h)(1)(B)(ii).

The Leagues request that the Commission confirm that the payment of a cable system's incremental copyright fees by a distant signal that is not located in the same television market as the system cannot cause such distant signal to be considered a "local" station for must-carry purposes. Thus, for example, even if WTBS were willing to indemnify a New York cable system for its increased copyright liability resulting from carriage of WTBS, WTBS cannot be considered a "local" must-carry station to that New York system.⁶

2. Requests to Add Communities to or Delete Communities from a Television Market (Paragraph 19).

Although the Commission notes that it has the authority to add communities to or delete communities from a station's television market "following a written request," the Act is

⁶The clarification sought by the Leagues is certainly consistent with the view expressed by the Commission that:

- ✓ Out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement.

Rule Making at Paragraph 45.

silent as to who is entitled to make such a request for modification.

The Leagues submit that, for the following reasons, any interested party should be permitted to make such a request to the Commission, including the owners of copyrighted programs.

First, neither the Act nor its statutory history require -- or even remotely suggest -- that broadcast stations and/or cable operators be the only parties entitled to make such requests.

Second, limiting requests to stations and/or operators could cause harm to other interested parties. For example, if not afforded the opportunity to request a change in the make-up of television markets, copyright owners could be denied the ability to exercise control over the distribution of their works, thereby undermining the effects of various Commission rules, such as syndicated exclusivity.

Finally, allowing professional sports organizations to request that certain communities be added to or deleted from a designated market would enable a league to coordinate its marketing efforts in a particular geographic area where there may be a natural affinity with a team or performer that would merit altering a certain television market to better reflect market realities and to effectuate the purposes of the Act. Accordingly, even though some communities in the southern portion of New Jersey technically may

be located in the expansive New York ADI, it is essential that a sports team in Philadelphia -- which is less than 35 miles away -- be able to target these New Jersey communities in order to successfully serve and nurture its community fan base.

Moreover, the Act expressly recognizes sports programming as one indicia of localism. In new Section 614(h)(1)(C)(ii), Congress has instructed the Commission, in determining whether to include a television station in a particular market, to consider whether the station

provides news coverage of
issues of concern to such com-
munity or provides carriage or
coverage of sporting and other
events of interest to the com-
munity

(Emphasis added.)

3. Conforming Must-Carry with Deletion Rules
(Paragraph 23).

The Leagues appreciate the difficulty of reconciling those situations where a local broadcast station may be entitled to must-carry status and is simultaneously subject to deletion due to network nonduplication and syndicated exclusivity rules.

However, in seeking to reconcile the conflicting interests at stake in such a situation, the Commission must be mindful of the express language of new Section 614(b)(3)(B) which requires that the protections afforded to

sports programming by virtue of Section 76.67 are not to be affected by the new must-carry provisions:

A cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited and other programming authorized to be substituted under Section 76.67 or Subpart F of Part 76 . . . or any successor regulations thereto.

Section 614(b)(3)(B).

The NHL seeks Commission recognition of a unique situation: In at least two markets -- Detroit and Buffalo -- Canadian stations without must-carry rights have been carried in the past. The Commission ought to note if must-carry stations may be deleted to satisfy Section 76.67 under Section 614(b)(3)(B), certainly signals which do not have must-carry rights are subject to deletion. Therefore, cable systems within 35 miles of Detroit and Buffalo may be required to delete Canadian signals of Detroit Red Wing and Buffalo Sabre home games carried on Canadian stations if Section 76.67 is applicable.

4. Definition of "Networks" (Paragraph 26).

With respect to the definition of the term "network" to be developed for purposes of applying the new must-carry provisions, the Leagues request that the Commission expressly exclude from the definition what are referred to in sports television as "regional networks" -- i.e.,

unaffiliated stations in a team's geographic region that carry that team's game broadcasts, but which duplicate no other programming.

B. Retransmission Consent

1. Scope of Rule Making Proceeding (Paragraph 43).

Under the explicit language of Section 325(b)(1) and its legislative history,⁷ retransmission consent applies to all "broadcasting stations" and not just to "television stations." Requiring the Commission to conduct a rule making proceeding with respect to the application of the new retransmission consent provisions to television stations does not mean those provisions do not apply to radio stations. As a result, should the Commission deem it necessary, a rule making proceeding to deal with the application of retransmission consent to radio stations should be opened.

2. The Scope of Exceptions to Retransmission Consent (Paragraphs 46-47).

As the Commission recognizes in Paragraph 45 of the Rule Making, "out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement." The only exceptions to this requirement are set forth in Section 325(b)(2), which

⁷See S. Rep. No. 102-92, 102d Cong., 1st Sess. 83-84 (1991) (hereinafter "Senate Report"); Conference Report, H. Rept. 102-862, 102d Cong., 2d Sess. ____ (1992) (hereinafter "Conference Report").

states that the need to obtain retransmission consent from a station does not apply to:

(A) retransmission of the signal of a noncommercial broadcasting station;

(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

(Emphasis added.)

The Leagues submit that, for the following reasons, the Commission is required to construe each exception to the application of retransmission consent as narrowly as possible in order to effectuate the purpose of Section 325.

First, as a matter of statutory construction, the exceptions must be read as "grandfathering" from the application of transmission consent only certain broadcast

stations in very limited circumstances.⁸ Subsections (B)-(D) of Section 325(b)(2) each establish two distinct requirements that must be satisfied in order for a station to qualify for an exception:

- Under subsection (B), the exception for retransmission of a broadcast station's signal to a home satellite antenna can be obtained only if (i) such station is not (i.e., not currently) owned by, or affiliated with, a network, and (ii) such signal was, on May 1, 1991, retransmitted by a satellite carrier to the home satellite antenna. Thus, a station that is not presently affiliated with a network would not qualify for this exception unless its signal had been retransmitted by satellite on May 1, 1991 to the home satellite antenna seeking carriage of the station.
- The exception under subsection (C) for retransmission of a broadcast station's signal to a home satellite antenna is available only if (i) such station is (i.e., currently) owned by, or affiliated with, a network, and (ii) the household receiving the signal is (i.e., currently) "unserved." As a result, retransmission consent need not be obtained for the reception by a home satellite antenna of a network affiliate's signal so long as the household receiving the signal is "unserved."
- Under subsection (D), the exception for retransmission of a superstation's signal by a cable operator or other multichannel video programming distributor is available only if, on May 1, 1991, (i) such signal was obtained by the operator or distributor seeking carriage of the superstation from a satellite carrier, and (ii) the originating station was a superstation. Accordingly, a cable system that currently receives the signal of a station that was a superstation on May 1, 1991 would be required to obtain retransmission consent from the

⁸As a matter of statutory construction, exceptions to statutes are to be narrowly construed. See, e.g., Group Life & Health Insurance v. Royal Drug Co., 440 U.S. 205, 231 (1979); National Broiler Marketing Ass'n v. U.S., 436 U.S. 816, 827-28 (1978).

superstation unless the system had received the superstation's signal from a satellite carrier on May 1, 1991.⁹

Moreover, the narrow interpretation of the exceptions to retransmission consent advocated by the Leagues is consistent with the view expressed by the Commission in Paragraph 47 of the Rule Making:

out-of-market retransmissions of television signals that are delivered to a cable system or other multichannel distributor by other means, such as microwave, or whose satellite carriage began after May 1, 1991, are not exempt from retransmission consent requirements.¹⁰

Second, the narrow construction of the exceptions is dictated by the statutory history of Section 325. With respect to the subsection (D) exception, for example, the original Senate version of the Act -- S.12 -- required cable systems to obtain retransmission consent from all superstations.¹¹

⁹Had Congress intended in Subsection (D) to exempt present or future carriage of superstations from retransmission consent rather than exempting only carriage as of May 1, 1991, it would have used the same construction and wording found in subsection (B) instead of the specific language contained in subsection (D).

¹⁰Limiting the scope of an exception based on signal carriage as of a certain date is also consistent with prior positions adopted by the Commission and Copyright Office. See, e.g., the Commission's definition of "grandfathered" signals being those carried on March 31, 1972 (see former regulations at 47 C.F.R. §76.65); see also Letter, dated November 21, 1984, to Trans-Am Communications Co. from Dorothy Schrader, General Counsel, Copyright Office.

¹¹As of December 31, 1994, all superstations would have been subjected to retransmission consent. See Senate Report at 83.

However, in an eleventh-hour amendment to S.12, the Senate voted not to require a cable operator or multichannel distributor to obtain the retransmission consent of specific superstations -- i.e., those that were actually carried by such operator or distributor on May 1, 1991.¹² This limited "grandfathering" was intended, and must be interpreted, to apply only to those certain superstations that qualify for the exception codified in Section 325(b)(2)(D). Accordingly, any station that either gained superstation status or was first distributed to an operator or distributor by satellite carrier after May 1, 1991 is not to be "grandfathered."

3. Applicability of Section 614 to Retransmission Consent (Paragraphs 55-56 and 61).

The Leagues urge the Commission to reconsider its tentative conclusion that Section 614(b)(3)(B), which requires cable operators to carry the complete program schedule of a "must-carry" station, does not apply to a station that is carried by virtue of a retransmission consent agreement.

Such an interpretation is not prescribed -- or even suggested -- by the Act or its legislative history. Moreover, this unfounded interpretation could undermine the fundamental purpose of Section 614 because it would enable a cable operator to satisfy its obligation under the must-

¹²138 Cong. Rec. S564-S565 (daily ed., January 29, 1992).

carry rules by putting together one composite, "cherry-picked" channel of stations that have consented to the retransmission of only a portion of the programming on their signals.

Accordingly, if the carriage of a retransmission consent station is to be counted for purposes of a cable system's must-carry obligation under Section 614, all of the provisions of Section 614, including those governing the manner in which cable systems should carry their must-carry station, should apply equally to any such retransmission consent station.

4. Program Exhibition Rights and Retransmission Consent (Paragraph 65).

The Leagues request that the Commission follow the explicit statutory direction set forth in Section 326(b)(6) not to construe the retransmission consent provisions as affecting existing or future license agreements between program suppliers and broadcast stations concerning, among other things, retransmission rights.

First, any interpretation that would ignore and render meaningless this express statutory instruction would violate the established rule of statutory construction that a statute must be interpreted to give meaning and effect to

every provision, and a construction that renders a clause meaningless should be avoided.¹³

Second, as the statutory language and legislative history of Section 325(b)(6) acknowledge, to enable copyright holders to maintain some control over the distribution of their works, and to effectuate the Commission's rules regarding syndicated exclusivity and network nonduplication, it is essential that copyright holders be allowed to negotiate agreements with broadcast stations expressly dealing with retransmission rights and that such agreements not be undermined by the authority granted to broadcasters under Section 325(1).

¹³See, e.g., Garza v. Marine Transp. Lines, Inc., 861 F.2d 23, 27 (2d Cir. 1988) (where an interpretation would render one clause superfluous or meaningless, it should be avoided).

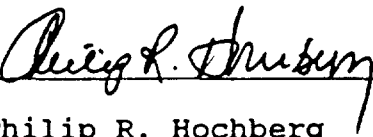
CONCLUSION

For the reasons stated herein, the National Basketball Association and the National Hockey League respectfully request adoption of these Comments.

Respectfully submitted,

NATIONAL BASKETBALL ASSOCIATION

NATIONAL HOCKEY LEAGUE

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STATEMENT OF
DAVID J. STERN, COMMISSIONER
NATIONAL BASKETBALL ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE
OF THE
COMMITTEE OF ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
MAY 9, 1990

Mr. Chairman: On behalf of the National Basketball Association and its member teams, I thank you for inviting us to present our views with respect to the current trends in media carriage of sports programming.

For the last decade, the NBA and its teams have followed a television policy that has provided for substantial coverage of games on over-the-air and cable television, on both a national and local level. The number of games available to viewers on each mode of distribution has varied to some degree during this period as we have struggled to find the appropriate balance between thorough coverage of our sport and overexposure. However, for the past several years, consistent with the growing popularity of NBA basketball, the number of games available to our fans has increased steadily on both free over-the-air television and cable.

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On national network television, NBA exposure has more than doubled over the last ten seasons. During the 1982-83 season, CBS Sports televised a total of 26 NBA games, including our Playoffs. This season, depending on the length of various Playoff series, CBS may televise up to 45 games. And, as part of our new agreement with NBC which will commence next season, there will be national broadcasts of up to 52 games in the 1990-91 season and up to 56 games in each of the three following seasons. This will involve increased coverage of both regular season and Playoff games, including some games previously available only on cable.

On the local level, there has been a similar increase in available games on free television. During the 1985-86 regular season, 523 games were shown on local over-the-air television; this past season, the number exceeded 700, an increase of approximately 35%. While some of this increase is due to the NBA's expansion by four teams during the last two years, even on a per-market basis the number of free local telecasts has increased some 13% during the past five seasons.

While the number of NBA games on free television has grown steadily in recent years, the number of games on cable television has shown a less consistent pattern, as we have sought to find the proper level of exposure on this newer and growing mode of distribution. Cable carriage has obviously grown steadily on the local level, simply as a result of the fact that regional cable sports channels, which did not exist ten years ago, have now been developed in more and more major cities. However, on the national level, the NBA has actually decreased its cable coverage as carriage has increased over-the-air. During the 1982-83 season, the NBA provided 90 regular season games to national cable networks. For the 1984-85 season, this number was cut to 54, and under our new agreement with TNT, the number of regular season games on national cable for each of the next four years will be 50. These figures do not include games distributed by so-called "superstations," a subject which is too extensive to discuss at this time but which has posed particular problems for the NBA in attempting to develop a coherent television policy with a sensible mix of broadcast and cable.

As we begin the decade of the 90's, the coverage of NBA games on national network television and national cable have been set by contract for the next four years, and this arrangement assures the continuation of our program of substantial coverage on both means of distribution. In addition, we expect within the next two seasons to begin exploring the marketing of our games via even newer technologies, such as direct broadcasts. However, I do not believe that these new forms of distribution will replace either network or cable in the televising of major sports programming. Rather, I think they will enable us to deliver more of our games to viewers who may not have been able to receive them via traditional means.

I am confident that for some time to come, free television will remain the key method of distribution to our fans. On both the national and local level, we recognize the promotional value of having our games available to all television households. And we also believe that this ability to reach all television households, particularly with our key events such as the All-Star Game and the NBA Finals, is absolutely vital to the success of our other marketing ventures in publishing, home video, licensing and corporate sponsorship. Accordingly, for the foreseeable future I do not anticipate any dramatic change in the number of NBA games available on, or shifting of our key events away from, free over-the-air television.